83-274

Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

SHERMAN ADAMS, ... PETITIONER

versus

CITY OF SHEPHERDSVILLE MAYOR, . . RESPONDENT
JAMES T. SPARROW AND
OFFICER BEN STILLWELL

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

David and Rebecca Murrell
3615 Kings Hwy.
Louisville, Kentucky
40220
(502) 451-4445

Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been serven upon the Hon. Mark Edison, Counsel for Respondent, 217 Buckman St. Shepherdsville, Ky 40165 . This is to further certify that all parties required to be served have been served by ordinary mail this 13th day of August, 1983, postage pre-paid and that service of this Petition has been made in conformity with Supreme Court Rule 28.3.

DAVID MURRELL

REBECCA MURRELL

QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals commit error in affirming a directed verdict for the Respondents on the basis that Petitioner did not establish that Mayor Sparrow was acting under color of state law under 42 USC 1983 when he signed a complaint for the arrest of the Petitioner where there was other evidence to establish that the Mayor and the city Council, in conjunction with Police Officer, Ben Stillwell had acted concertedly to deny the Petitioner his First Amendment rights under the United States Constitution.

PARTIES

The parties to this suit are Sherman Adams, Petitioner and City of Shepherdsbille, Mayor James T. Sparrow and Police Officer Ben Stilwell, Respondents.

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FINAL ORDER OF UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF KENTUCKY

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OPINION BELOW

The United States Court of Appeals for the Sixth Circuit entered an unpublished opinion, (Appendix), United States Court of Appeals for the Sixth Circuit File No. 82-5094.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 17, 1983. The opinion of the United States Court of Appeals for the Sixth Circuit affirmed the opinion of the United States District Court for the Western District of Kentucky wherein the District Court directed a verdict against Petitioner for the reason that Mayor Sparrow was not acting under color of state law under 42 USC 1982 when he signed a complaint for the arrest of Petitioner notwithstanding other evidence presented

by petitioner which established that the Mayor and City Council, in conjunction with Police Officer Ben Stillwell had acted concertedly to deny petitioner his First Amendment rights under the United States Constitution. Jurisdiction of this Court to hear this Petition for Certiorari is based upon 28 USC 1254(1)

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the freedom of assembly clause of the First Amendment of the Federal Constitution.

> Congress shall make no law... abridging...the right of people to peaceably assemble.

STATUTORY PROVISIONS

The statute involved is 42 USC 1983

> Every person who, under color of any statute, ordinance, regulation, custom or useage of any state or territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ...to the deprivation of any rights, privleges or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioner was the president of the Kentucky Chapter of the United Klans of America. That organization planned to have a parade celebrating the 200th anniversary of the Declaration of Independence on July 4, 1976, in Shepherdsville Kentucky. The Petitioner first sought a permit from the city council of Shepherdsville in order to have such a parade. At the city council meeting on June 14, 1976 the city council, with Mayor Sparrow presiding, gave the Petitioner permission to hold a parade within the city limits of Shepherdsville, Ky. It should be pointed out here that the City of Shepherdsville did not have any parade permit ordinance in existance at the time this case arose. At a meeting held July 1, 1976 the city council, with the urging

of the Respondent, Mayor Saprrow, revoked permission given to the Klan to hold a parade on July 3, 1976.On the morning of the proposed parade the Respondent, Mayor Sparrow, came to Petitioner's home to request that the parade not be conducted. Immediately prior to the beginning of the parade the Respondent, Mayor again asked the Petitioner not to conduct the parade. As the parade began through the city of Shepherdsville, another Respondent, Police Officer Stillwell, a policeman for the City of Shepherdsville, ordered the parade to disperse. The Petitioner and the members of his organization disobeyed that order to disperse and proceded to move peaceably through the city of Shepherdsville. There was no violence or any other tumult or interruption of any vital public service. No one was arrested on that day of July 3, 1976. HOwever, seventeen days later,

on July 20, 1976, Mayor Sparrow signed a complaint for the arrest of the Petitioner on the grounds that he was guilty of disorderly conduct for disobeying the orders of a police Officer to disperse under KRS 525.060. Mayor Sparrow did not give the title of his office when he signed this complaint, but only signed it with his given name, James T. Sparrow. The Petitioner went through a trial in Police Court in Shepherdsville where he received a suspended 30 day sentence and a $90 fine. Petitioner appealed this ruling to the state circuit court and in a trial de novo the Petitioner received a sentence of 90 days in jail. The Petitioner appealed that conviction to the Kentucky Court of Appeals but the appeal was dismissed on technical grounds. The Court of Appeals of Kentucky and the Supreme Court of Kentucky did not decide this case on its merits. On November 5, 1979, the

Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court for the Western District of Kentucky, alleging that his conviction was unlawful because it violated his first amendment rights to peaceably assemble. On December 20, 1979, The District Court granted the Petition for Writ of Habeas Corpus and the Petitioner was released from custody after having served 50 days of the 90 day jail sentence. The Petitioner then brought an action under Section 1983 of Title 42 of the United States Code seeking damages from the City of Shepherdsville, the Mayor and the police Officer of that city on the grounds that those three parties had violated his civil rights. At the trial of this action the Petitioner presented his evidence, but at the close of the evidence the court directed a verdict for the Respondents on the ground that the signing of the complaint by the

Respondent, Mayor Sparrow, was not done under color of state law since any citizen could have signed a complaint and because Mayor Sparrow did not sign that complaint in any official capacity. Petitioner appealed the ruling of the District Court for the Western District of Kentucky to the Sixth Circuit Court of Appeals and that court upheld the ruling of the District Court. This Petition for Certiorari now follows.

REASONS FOR REVIEW

Whether the Sixth Circuit Court of Appeals committed error in affirming a directed verdict for Respondent on the basis that Petitioner did not establish that Mayor Sparrow was acting under color of state law under 42 USC 1983 when he signed a complaint for the arrest of the Petitioner where there was other evidence to establish that the Mayor and the

city council, in conjunction with Police Officer, Ben Stillwell, had acted concertedly to deny the Petitioner his first Amendment rights under the United States Constittuiton.

This question which Petitioner wishes this Court to review is a question which this Court has not directly addressed but is a question which is ripe for review. Failure by this Court to address this question could result in a serious undermining of the entire purpose underlying 42 USC 1983 for the reason that a giant loophole will have been created whereby those acting in an official capacity could always avoid liability for acting "under color of state law".

Certainly this issue would be crucial regardless of the particular Constitutional freedom involved. However, it is a particularly vital

issue where First Amendment rights are involved as in the instant case.

This Court has held in the case of Dennis v. Sparks, 449 US 24 that private citizens are liable for damages under a Section 1983 action if they act in concert with other public officials, even though those public officials may be immune from suit.

This Court should, at this time, for the sake of protection of the civil rights which are essential to the citizens of this country, make the further clarifying decision that a public official may not gain some sort of immunity from liability simply by acting as a private citizen where he has previously engaged by himself and with others in an ongoing course of conduct to deny a citizen his Constitutional rights and was unsuccessful in so doing in his official capacity.

For the foregoing reason we request

that this Court issue a Writ of Certiorari in the instant case.

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NO. 82-5094

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

MAY 17 1983

JOHN P. HEHMAN, Clerk

SHERMAN ADAMS

Plaintiff-Appellant

v.

ORDER

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL

Defendants-Appellees

BEFORE: LIVELY and ENGEL, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

The plaintiff appeals from the judgment of the district court entered on a directed verdict at the conclusion of the plaintiff's case. The plaintiff was convicted of violation of Kentucky's disorderly conduct statute in proceedings that were commenced with a complaint signed by the mayor of Shepherdsville. The complaint arose out of the refusal of an organization of which the plaintiff was the head to disperse a parade on a main thoroughfare of the city after being requested to do so by the mayor and ordered to do so by the defendant police officer. The parade was carried off without incident and 17 days later the mayor signed a complaint. Thereafter the plaintiff was convicted of disorderly conduct in the Shepherdsville Police Court, appealed and at a trial de novo was again convicted by a jury in circuit court. Thereafter he took unsuccessful appeals to the Kentucky Court of Appeals and the Kentucky Supreme Court.

The present action charges that the plaintiff's First Amendment rights were violated by the defendants. The district court found that the police officer did nothing more than order a crowd to disperse, that the crowd did not disperse and that no constitutional rights were violated by his action. The district court also found that the mayor signed the complaint 17 days after the incident in his individual capacity as a citizen and not in his official capacity as the mayor. In granting the motion for directed verdict the district court found that the city and the police officer did not deprive the plaintiff of any rights and that the mayor did not act under color of law in filing the complaint. Thus the requirements for proceeding under 42 U.S.C. §1983 were not met with respect to the claims against any of the defendants.

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, this court concludes that the district court did not err, after having heard all of the plaintiff's evidence, in granting a directed verdict for the defendants. Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SHERMAN ADAMS
Plaintiff

v. NO. C 80-0216-L(R)

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL
Defendants

JUDGMENT

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the defendants, James T. Sparrow, Ben Stillwell and the City of Shepherdsville, for directed verdict be and it hereby is granted and this action be and it hereby is dismissed with prejudice at the cost of the plaintiff.

There is no just reason for delay, and this is a final and appealable Order.

This 12th day of January, 1982.

Thomas A. Ballantine Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:
Counsel of record

ENTERED
1/13/82

D-1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SHERMAN ADAMS Plaintiff	)	
V.	)	NO. C 80-0236-L(B)
CITY OF SHEPHERDSVILLE, MAYOR JAMES T. SPARROW, OFFICER BEN STILLWELL Defendants	)	

MEMORANDUM

This matter came on to be tried before the Court with a jury on January 7 and January 8, 1982. At the conclusion of plaintiff's evidence the defendants moved for a directed verdict, F.R.Civ.P. 50(a), and the Court granted the motion. Since the Court's reasons for granting the motion differ from the reasons presented by defendants in support of their motion, the Court finds it appropriate to set forth the grounds upon which it relied.

FACTS

On November 25, 1980, in a memorandum denying plaintiff's motion for summary judgment, the Court set forth the facts from which this action arose. The Court has also recited the factual background of this controversy in its memorandum granting plaintiff's petition for a writ of habeas corpus. See Adams v. Bullitt County Jailer, C 79-0572-L(B)(W.D. Ky., 1979). Those memoranda are incorporated herein by reference.

Briefly, it was established at the trial that plaintiff is the leader of the Ku Klux Klan in Kentucky. That organization determined that it should mark the Bicentennial

D-2

Anniversary of the Declaration of Independence by a parade through the streets of Shepherdsville, a Kentucky community of about 4500 people. At the time of the parade, Saturday, July 3, 1976, Shepherdsville had a police force of four full-time and four part-time officers.

On June 14, 1976, plaintiff and some of his fellow Klansmen appeared before the Shepherdsville City Council, made up of the Mayor, defendant Sparrow, and five councilmen. The Council voted to issue a parade permit. On July 1, 1976, the Council rescinded the permit, reciting what it perceived to be imminent danger of violence. (Both the issuance and rescission of the parade permit were probably nullities, since Shepherdsville has no ordinance requiring parade permits.)

On July 3, 1976, about 200 Klansmen, many robed and hooded and carrying firearms, gathered on a side street in Shepherdsville to form the parade. Defendant Sparrow asked them to disperse. When this request was ignored defendant Stillwell, Chief of the Shepherdsville Police Department, using a bullhorn, ordered the paraders to disperse. This order was no more effectual than the Mayor's request and the parade was held admittedly without incident.[1]

Seventeen days later defendant Sparrow signed a complaint charging plaintiff with a violation of KRS 525.060(1)(d).[2] A warrant was issued and plaintiff was arrested. He appeared before the Shepherdsville Police Court, presided over by a

---

[1]At trial plaintiff offered the somewhat incredible testimony that members of the black community of Shepherdsville applauded and cheered the parading members of the Ku Klux Klan.

[2]KRS 525.060: (1) A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, he: **** (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose."

nonlawyer. He was found guilty and sentenced to 30 days in jail and fined $100.00 plus $12.00 in court costs. The jail sentence, the fine and the costs were "probated".

Plaintiff appealed the conviction to the Bullitt Circuit Court. He was tried by that court with a jury, found guilty and sentenced to 90 days in jail and fined $250.00. Attempted appeals to the Kentucky Court of Appeals and the Supreme Court of Kentucky were dismissed on procedural grounds and on November 2, 1979, plaintiff began service of his jail sentence. As we have noted, this Court granted plaintiff's petition for a writ of habeas corpus and he was discharged on December 21, 1979. This action was filed April 30, 1980. Plaintiff invoked the Court's jurisdiction under Title 42 U.S.C. Section 1983.

The complaint which the defendant Sparrow signed and upon which the warrant was issued, contained no reference to his position as Mayor of Shepherdsville.

DISCUSSION

After hearing the evidence the Court concluded that no violation of Section 1983 could be successfully maintained against Stillwell. The only participation attributed to him was his ineffective order to disperse. Had Stillwell successfully blocked the parade we might reach a different conclusion. He did not and his motion for directed verdict was granted.

We turn next to the more troublesome question of Sparrow's actions. As we have noted, the complaint was signed some 17 days after the parade and was signed "James T. Sparrow." The complaint is facially valid in that it charges a public offense. It is a complaint that could have been signed by any citizen of Shepherdsville.

A-4

It is elementary that:

> "[T]he terms of Section 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom or usage of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'" Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604 (1970).

Since we conclude that the signing of the complaint was not an act that amounted to a misuse of power possessed by virtue of state law and made possible only because Sparrow was clothed with authority of state law, Williams v. United States, 341 U.S. 97, 71 S.Ct. 576 (1951), we determine that plaintiff cannot meet the second element of Adickes, supra. See also, Kerr v. City of Chicago, 424 F.2d 1141 (7th Cir. 1970).

In Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979), the Court wrote:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976), false imprisonment does not became a violation of the Fourteenth Amendment merely because the defendant is a state official.
>
> Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under § 1983." 443 U.S. at 146, 99 S.Ct. at 2695.

Our determination that neither individual defendant is liable to plaintiff under Section 1983 compels the conclusion

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that the defendant, City of Shepherdsville, is outside the holding in Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398 (1980). There simply isn't any evidence of action taken by any representative of the City under color of law. Whether plaintiff would have had a cause of action against Sparrow for malicious prosecution or false arrest we do not decide.

CONCLUSION

For the reasons discussed above, the Court has determined that defendants' motion for directed verdict should be granted, and an appropriate Judgment has been entered this date.

January 12, 1982

Thomas A. Ballantine Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:
Counsel of record

ENTERED
1/13/82

D-6

B

83-274

Office-Supreme Court, U.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

SHERMAN ADAMS, ... PETITIONER

versus

CITY OF SHEPHERDSVILLE MAYOR, . . RESPONDENT
JAMES T. SPARROW AND
OFFICER BEN STILLWELL

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

David and Rebecca Murrell
3615 Kings Hwy.
Louisville, Kentucky
40220
(502) 451-4445

Counsel for Petitioner

SUPPLEMENTAL APPENDIX

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served upon the Hon. Mark Edison, Counsel for Respondent, 217 Buckman Street, Shepherdsville, Kentucky, 40165. This is to further certify that all parties required to be served have been served by ordinary mail this 18th day of August, 1983, postage pre-paid and that service of this Petition has been made in conformity with Supreme Court Rule 28.3.

DAVID MURRELL

REBECCA MURRELL

NO. 82-5094
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERMAN ADAMS

Plaintiff-Appellant

v.

O R D E R

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL

Defendants-Appellees

Before: LIVELY and ENGEL, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

The plaintiff appeals from the judgment of the district court entered on a directed verdict at the conclusion of the plaintiff's case. The plaintiff was convicted of violation of Kentucky's disorderly conduct statute in proceedings that were commenced with a complaint signed by the mayor of Shepherdsville. The complaint arose out of the refusal of an organization of which the plaintiff was the head to disperse a parade on a main thoroughfare of the city after being requested to do so by the mayor and ordered

to do so by the defendant police officer. The parade was carried off without incident and 17 days later the mayor signed a complaint. Thereafter the plaintiff was convicted of disorderly conduct in the Shepherdsville Police Court, appealed and at a trial de novo was again convicted by a jury in circuit court. Thereafter he took unsuccessful appeals to the Kentucky Court of Appeals and the Kentucky Supreme Court.

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directed verdict the district court found that the city and the police officer did not deprive the plaintiff of any rights andthat the mayor did not act under color of law in filing the complaint. Thus the requirements for proceeding under 42 U.S.C. §1983 were not met with respect to the claims against any of the defendants.

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, this court concludes that the district court did not err, after having heard all of the plaintiff's evidence, in granting a directed verdict for the defendants. Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SHERMAN ADAMS Plaintiff	)	
v.	)	NO. C 80-0236-L(B)
CITY OF SHEPHERDSVILLE, MAYOR JAMES T. SPARROW, OFFICER BEN STILLWELL Defendants	)	

J U D G M E N T

For the reasons set forth in the Memorandum filed this date,

It is ORDERED that the motion of the defendants, James T. Sparrow, Ben Stillwell and the City of Shepherdsville, for directed verdict be and it hereby is granted and this action be and it hereby is dismissed with prejudice at the cost of the plaintiff.

There is no just reason for delay, and this is a final and appealable Order.

This 11th day of January , 1982.

Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SHERMAN ADAMS Plaintiff	)	
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FACTS

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plaintiff was arrested. He appeared before the Shepherdsville Police Court, presided over by a nonlawyer. He was found guilty and sentenced to 30 days in jail and fined $100.00 plus $12.00 in court costs. The jail sentence, the fine and the costs were "probated".

Plaintiff appealed the conviction to the Bullitt Circuit Court. He was tried by that court with a jury, found guilty and sentenced to 90 days in jail and fined $250.00. Attempted appeals to the Kentucky Court of Appeals and the Supreme Court of Kentucky were dismissed on procedural grounds and on November 2, 1979, plaintiff began service of his jail sentence. As we have noted, this

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[1]At trial plaintiff offered the somewhat incredible testimony that members of the black community of Shepherdsville applauded and cheered the parading members of the Ku Klux Klan.

[2]KRS 525.060: (1) A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, he: **** (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose."

Court granted plaintiff's petition for a writ of habeas corpus and he was discharged on December 21, 1979. This action was filed April 30, 1980. Plaintiff invoked the Court's jurisdiction under Title 42 U.S.C. Section 1983.

The complaint which the defendant Sparrow signed and upon which the warrant was issued, contained no reference to his position as Mayor of Shepherdsville.

DISCUSSION

After hearing the evidence the Court concluded that no violation of Section 1983 could be successfully maintained against Stillwell. The only participation attributed to him was his ineffective order to disperse. Had Stillwell successfully blocked the parade we might reach a different conclusion. He did not and his motion for directed verdict was granted.

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have noted, the complaint was signed some 17 days after the parade and was signed "James T. Sparrow". The complaint is facially valid in that it charges a public offense. It is a complaint that could have been signed by any citizen of Shepherdsville.

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Since we conclude that the signing of the complaint was not an act that amounted to a misuse of power possessed by virtue of state law and made possible only because Sparrow was clothed with authority of state law, Williams v. United States, 341 U.S. 97, 71 S. Ct. 576 (1951), we determine that plaintiff cannot meet

the secondelement of Adickes, supra. See also, Kerr v. City of Chicago, 424 F.2d 1141 (7th Cir. 1970).

In Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979), the Court wrote:

"Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '(m)edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' Estelle v. Gamble, 429 U.S. 97, S.Ct. 285, 292, 50 L.Ed.2d 251 (1976), false imprisonment does not became a violation of the Fourteenth Amendment merely because the defendant is a state official.

Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under Section 1983." 443 U.S. at 146, 99 S.Ct. at 2695.

Our determination that neither individual defendant is liable to plaintiff under Section 1983 compels the conclusion that the defendant, City of Shepherdsville, is outside the holding in Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398 (1980). There simply isn't any evidence of action taken by any

representative of the City under color of law. Whether plaintiff would have had a cause of action against Sparrow for malicious prosecution or false arrest we do not decide.

CONCLUSION

For the reasons discussed above, the Court has determined that defendants' motion for directed verdict should be granted, and an appropriate Judgment has been entered this date.

January 12, 1982

Thomas A. Ballantine, Jr.
United States District
Judge

Copies to:

Counsel of record

83-274

No.

Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

SHERMAN ADAMS, ... Petitioner

vs.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW and
OFFICER BEN STILLWELL . . Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

SHERMAN ADAMS, - - - - - *Petitioner*

v.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW, and
OFFICER BEN STILLWELL - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the freedom of assembly clause of the First Amendment of the Federal Constitution.

> Congress shall make no law . . . abridging . . . the right of people to peaceably assemble.

STATUTORY PROVISIONS

The Statutes involved are 42 USC § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or useage of any state or territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

and KRS 525.060(1)(d)

A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:

. . . Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

Supreme Court of the United States

Part V.

JURISDICTION ON WRIT OF CERTIORARI

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI .1(a)(b)(c)

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of

judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

ARGUMENT

There is but one issue this Court need look to in deciding whether or not to grant this Petition for Certiorari and that is, does it fit within any of the guidelines of Supreme Court Rule 17 or any of the cases decided by this Court in granting this form of relief.

Although Rule 17 does not set forth all grounds for the grant of this relief it gives a rather broad description of areas to be dealt with.

In examining the Petition there is no allegation that the United States Sixth Circuit Court of Appeals rendered a decision in conflict with any other federal court or decided this case in conflict with any state court of last resort.

The only case mentioned by Petitioner is that of *Dennis* v. *Sparks*, 449 U. S. 24 which deals with a conspiracy between various parties, one of which was

acting under color of law but who was imminent from prosecution. In the case at bar the Petitioner was unable to convince the Judge for the Western District of Kentucky that there was any conspiracy between any governmental officials at any time. The Petitioner failed in this presentation so badly that the Court granted a motion for a directed verdict at the close of the Petitioner's proof. (Appendix).

In no way can the Petitioner claim to fall within the jurisdictional guidelines of Supreme Court Rule 17.1(b) for there is no conflict between any state courts of last resort and any federal courts of appeal. This issue was never decided by the Kentucky Supreme Court and therefore any requirement for final action by a state court of last resort can never be met in this case.

As for Supreme Court Rule 17.1(c) there is no new federal issue raised in this action nor does its disposition by the lower court conflict with any prior decision of this Court.

This Court has previously held on numerous occasions that for an action to lie under 42 USC § 1983 there must be some action taken under color of state law.

The only action alleged at trial or in this petition is that James T. Sparrow did on July 20, 1976 sign a criminal warrant alleging the Petitioner violated KRS 525.060(1)(d). Even though the Petitioner at trial had the opportunity to establish this action was under color of state law he was unable to do so.

He has failed at all steps of the judicial process—Shepherdsville Police Court, Bullitt Circuit Court, United States District Court and the United States Sixth Circuit Court of Appeals to show any action by any official which in any way deprived him of any rights, privileges, or immunities secured by the Constitution and laws.

As to the constitutionality of KRS 525.060(1)(d) this issue has not been previously raised and is not raised here. Therefore, it must be believed that Petitioner believes it constitutional and the actions taken under this Statute were then and are now legitimate and legal.

This Court need look no further than the decision of the District Court to see that immunity was not an issue at trial and therefore the alleged loophole seen by the Petitioner did not then or now exist.

The Court has previously stated in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500 at Page 351:

> "certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision'."

The Court also stated in *Rogers (ibid)* at page 530:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing . . .".

CONCLUSION

This case does not fall within any of the guidelines established by the appropriate rules or case law governing the grant of Certiorari and therefore this Petition should be denied.

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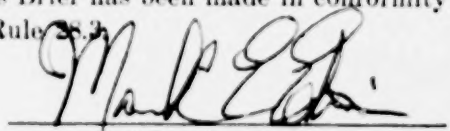
CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari have been served upon the Hon. David Murrell and Hon. Rebecca Murrell, Counsels for Petitioner, 3615 Kings Hwy., Louisville, Kentucky 40220. This is to further certify that all parties required to be served have been served by ordinary mail this 10th day of September, 1983, postage prepaid and that service of this Brief has been made in conformity with Supreme Court Rule 28.3.



MARK E. EDISON

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

No. C 80-0236-L(B)

SHERMAN ADAMS - - - - - - - *Plaintiff*

v.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL - - - - - *Defendants*

JUDGMENT—Entered January 12, 1982

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the defendants, James T. Sparrow, Ben Stillwell and the City of Shepherdsville, for directed verdict be and it hereby is granted and this action be and it hereby is dismissed with prejudice at the cost of the plaintiff.

There is no just reason for delay, and this is a final and appealable Order.

This 12th day of January, 1982.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 80-0236-L(B)

SHERMAN ADAMS - - - - - - - *Plaintiff*

v.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL - - - - - *Defendants*

MEMORANDUM—Entered January 12, 1982

This matter came on to be tried before the Court with a jury on January 7 and January 8, 1982. At the conclusion of plaintiff's evidence the defendants moved for a directed verdict, F. R. Civ. P. 50(a) and the Court granted the motion. Since the Court's reasons for granting the motion differ from the reasons presented by defendants in support of their motion, the Court finds it appropriate to set forth the grounds upon which it relied.

FACTS

On November 25, 1980, in a memorandum denying plaintiff's motion for summary judgment, the Court set forth the facts from which this action arose. The Court has also recited the factual background of this controversy in its memorandum granting plaintiff's petition for a writ of habeas corpus. *See Adams* v. *Bullitt County Jailer*, C 79-0572-L(B)(W.D. Ky., 1979). Those memoranda are incorporated herein by reference.

Briefly, it was established at the trial that plaintiff is the leader of the Ku Klux Klan in Kentucky. That organization determined that it should mark the Bicentennial Anniversary of the Declaration of Independence by a parade through the streets of Shepherdsville, a Kentucky community of about 4500 people. At the time of the parade, Saturday, July 3, 1976, Shepherdsville had a police force of four full-time and four part-time officers.

On June 14, 1976, plaintiff and some of his fellow Klansmen appeared before the Shepherdsville City Council, made up of the Mayor, defendant Sparrow, and five councilmen. The Council voted to issue a parade permit. On July 1, 1976, the Council rescinded the permit, reciting what it perceived to be imminent danger of violence. (Both the issuance and rescission of the parade permit were probably nullities, since Shepherdsville has no ordinance requiring parade permits.)

On July 3, 1976, about 200 Klansmen, many robed and hooded and carrying firearms, gathered on a side street in Shepherdsville to form the parade. Defendant Sparrow asked them to disperse. When this request was ignored defendant Stillwell, Chief of the Shepherdsville Police Department, using a bullhorn, ordered the paraders to disperse. This order was no more effectual than the Mayor's request and the parade was held admittedly without incident.[1]

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[1]At trial plaintiff offered the somewhat incredible testimony that members of the black community of Shepherdsville applauded and cheered the parading members of the Ku Klux Klan.

Seventeen days later defendant Sparrow signed a complaint charging plaintiff with a violation of KRS 525.060 (1)(d).[2] A warrant was issued and plaintiff was arrested. He appeared before the Shepherdsville Police Court, presided over by a nonlawyer. He was found guilty and sentenced to 30 days in jail and fined $100.00 plus $12.00 in court costs. The jail sentence, the fine and the costs were "probated".

Plaintiff appealed the conviction to the Bullitt Circuit Court. He was tried by that court with a jury, found guilty and sentenced to 90 days in jail and fined $250.00. Attempted appeals to the Kentucky Court of Appeals and the Supreme Court of Kentucky were dismissed on procedural grounds and on November 2, 1979, plaintiff began service of his jail sentence. As we have noted, this Court granted plaintiff's petition for a writ of habeas corpus and he was discharged on December 21, 1979. This action was filed April 30, 1980. Plaintiff invoked the Court's jurisdiction under Title 42 U.S.C. Section 1983.

The complaint which the defendant Sparrow signed and upon which the warrant was issued, contained no reference to his position as Mayor of Shepherdsville.

DISCUSSION

After hearing the evidence the Court concluded that no violation of Section 1983 could be successfully maintained against Stillwell. The only participation attributed to him was his ineffective order to disperse. Had Still-

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[2]KRS 525.060: (1) A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, he: **** (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose."

well successfully blocked the parade we might reach a different conclusion. He did not and his motion for directed verdict was granted.

We turn next to the more troublesome question of Sparrow's actions. As we have noted, the complaint was signed some 17 days after the parade and was signed "James T. Sparrow." The complaint is facially valid in that it charges a public offense. It is a complaint that could have been signed by any citizen of Shepherdsville.

It is elementary that:

> "[T]he terms of Section 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom or usage of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law'." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 150, 90 S. Ct. 1598, 1604 (1970).

Since we conclude that the signing of the complaint was not an act that amounted to a misuse of power possessed by virtue of state law and made possible only because Sparrow was clothed with authority of state law, *Williams* v. *United States*, 341 U. S. 97, 71 S. Ct. 576 (1951), we determined that plaintiff cannot meet the second element of *Adickes*, *supra*. *See also*, *Kerr* v. *City of Chicago*, 424 F. 2d 1141 (7th Cir. 1970).

In *Baker* v. *McCollan*, 443 U. S. 137, 99 S. Ct. 2689 (1979), the Court wrote:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of

duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle* v. *Gamble*, 429 U. S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under § 1983." 443 U. S. at 146, 99 S. Ct. at 2695.

Our determination that neither individual defendant is liable to plaintiff under Section 1983 compels the conclusion that the defendant, City of Shepherdsville, is outside the holding in *Owen* v. *City of Independence, Missouri*, 445 U. S. 622, 100 S. Ct. 1398 (1980). There simply isn't any evidence of action taken by any representative of the City under color of law. Whether plaintiff would have had a cause of action against Sparrow for malicious prosecution or false arrest we do not decide.

CONCLUSION

For the reasons discussed above, the Court has determined that defendants' motion for directed verdict should be granted, and an appropriate Judgment has been entered this date.

January 12, 1982

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record